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Takings Law
Fact and Fiction

The area of law referred to as "takings" law can be complex and confusing. This article will review the general principles of takings law for the layman who needs a basic understanding to comply with the law and avoid the widely circulated "myths" about takings.[1] Citizens, non-profit organizations, land trusts, local governments, and others who struggle to protect America's battlefields will face many challenges and sometimes stiff opposition. All too often, a real estate developer who wants to build a superstore, a housing development, or a shopping mall on a rural field sees recognition of the land as significant to America's history as a direct threat to the landowner's right to pursue a profit.

The dedication that battlefield preservationists possess about their right and responsibility to protect hallowed ground may clash head on with the passion other people feel about their right to use land as they choose. There has been a great deal of misinformation, exaggeration, and hyperbole injected into the debate over property rights in recent years. While the courts of the United States continue to expand the case law interpreting the constitutional protections of property owners, the law has not changed dramatically; and the tools and programs to protect cultural and natural resources remain on solid legal ground. Battlefield preservationists and their partners in governmental agencies need not be intimidated by those who claim that "the takings clause" prevents them from designating and appropriately protecting lands of historical and cultural significance.[2] The Fifth Amendment to the United States Constitution provides:

> ....nor shall private property be taken for public use, without just compensation.[3]

The takings clause of the Fifth Amendment provides one of our most basic rights and freedoms as Americans. The ability of courts to rely on this simple clause, written in the 18th century, to maintain the balance between the public good and individual liberty as we approach a new millennium is strong testament to the brilliance of the Constitution and the Bill of Rights. Advocates for the protection of America's heritage should never allow their opponents to characterize them as **opposing** constitutional protections, although those charges are often made.

As stated eloquently by the Honorable Randall T. Shepard, Chief Justice, Indiana Supreme Court and a member of the Board of Trustees of the National Trust for Historic Preservation:

> ....Most Americans see the Fifth Amendment as a shield protecting us from government overreaching. Others seek to use it as a sword, a weapon against efforts to conserve what is special about this land. Americans who are committed to building better communities must understand the role of law and the takings clause of the Fifth Amendment if they are to be effective builders....[4]

Since the 1960s, citizens who recognize our responsibility to identify and to protect those special places that represent our history and culture have built up an increasingly full "tool box" of local ordinances, state statutes, federal laws and, increasingly, incentives in taxation and funding programs that encourage the protection of resources. As battlefields are identified and recorded, those who advocate conservation of these lands and sites have chosen from among the legal tools developed by the historic preservation and land conservation movements. In recent years, the private property rights campaign—waged in state and federal courts, the legislatures, and in the court of public opinion—has had the goal of removing some of those valuable tools from the land protection tool box.

The private property rights campaign's limited success has been primarily in the public relations arena where increasing attention in the press, presentations at local civic clubs, and the broad distribution of videos and newsletters, have encouraged the impression of a shift in law and policy. It is incumbent upon preservationists to keep informed and not to be intimidated or unduly restricted in efforts using time-tested preservation tools and to continue developing innovative approaches in the future. Nevertheless, those who apply laws and administer resource protection programs need to comply with constitutional requirements and to respect fully the rights of property owners.

Physical Taking of Property

The aspect of takings law that is easiest to understand is eminent domain or condemnation—where the government actually acquires title to real property that had been privately owned. Eminent domain may be exercised to build a road, provide land for a public facility such as a school or a landfill, or to promote some other public purpose. The government must show that acquisition of the land is for a legitimate public purpose and must pay compensation to the landowner. The rights of the landowner in eminent domain cases are protected by statutes describing the process and procedure to be followed and by the due process clause of the United States Constitution as well as the Fifth

Amendment.[5] As any individual who owns—or hopes to own—real estate understands, it is reassuring that the government is restrained in its ability to "take" land and that the courts are available to protect the rights of citizens from an overzealous government agency.

A critical concept to remember in eminent domain cases—and in the "regulatory takings" cases that will be discussed later—is that the Fifth Amendment does not prohibit the government from taking private property; but it simply guarantees that when government needs to take land for a public purpose, it will pay "just compensation" to the owner.

Regulatory Takings

If takings law were limited to cases in which the title to the land passes to the government, this would be one of the most elementary and widely understood areas of constitutional law. However, in the 20th century, the law of takings has been extended to certain cases where the government merely **restricts** a private owner's **use** of his land in order to protect the larger public—but the owner retains full title to the property. The overwhelming majority of governmental programs and laws that regulate activities and the use of land do not require that the government in any way compensate the property owner. The complexity of takings law comes from the fact that, in some few cases, the courts have found that the impact of regulation does require that the government agency pay compensation to the property owner.

The first United States Supreme Court case that opened the door for claims of compensation for a "regulatory taking" was *Pennsylvania Coal Co. v. Mahon*.[6] In the 1920s, the Pennsylvania legislature passed a law that prohibited coal companies from mining coal beneath the ground in a municipality that would result in buildings or streets sinking. Significant to the Court's finding of a taking was that the coal company had sold only the surface rights to a private owner and retained the subsurface rights. The purchaser of the surface rights had specifically waived any claim against the coal company for future subsidence caused by coal mining.[7] When the case was decided in 1926, the Court struck down the Pennsylvania statute. Justice Oliver Wendell Holmes[8] wrote "The general rule, is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."[9] Although many believe that Justice Holmes "rewrote the Constitution" in the *Pennsylvania Coal* majority opinion,[10] it is the beginning of a series of Supreme Court cases that more precisely define when government regulation goes "too far."

After *Pennsylvania Coal*, administrators of government programs that regulated use of real property from the local to the federal level had to make their best judgment regarding whether the enforcement of a regulation in a particular case would constitute a "regulatory taking." Slowly, more detail was added by judges who wrote opinions applying constitutional requirements to regulatory actions on a case by case basis. The earliest legal decisions arose in cases about the early-20th-century planning concept of zoning.[11] In *Euclid v. Ambler Realty Co.*,[12] also decided in 1926, the U.S. Supreme Court recognized zoning as a legitimate use of governmental "police power" to protect the public good and denied the plaintiff's claims of a regulatory taking.[13] As the early takings cases were decided in the 1920s and 30s, two factors emerged as central to the takings inquiry: 1) the degree of economic impact on the property owner, and 2) the need to protect the public good and the rights of neighboring property owners.

There was a 50-year gap in which the Supreme Court did not issue another opinion on takings law. During this time, the state courts and lower federal courts heard cases and issued many opinions, without further guidance from the Supreme Court. These state and federal courts developed case law that could roughly be summarized in a test involving the following three questions:

- What is the economic impact on the property owner?[14]
- Does the regulation promote a valid public purpose?[15]
- What is the character of the government action?[16]

The Importance of Penn Central

It is fortunate for historic preservationists that the most important takings case—and certainly the most clearly written Supreme Court opinion in this area of the law—solidly confirms the constitutionality of a local historic preservation ordinance. *Penn Central Transportation Company v. New York City*[17] was the result of a challenge to an urban design review district. The principles and structure of an ordinance that protects the architectural and historic character of an urban district are fundamentally similar to a rural preservation ordinance designed to protect the qualities of a historic battlefield. In Justice Brennan's well known majority opinion in *Penn Central*, some important concepts were articulated, including:

- Communities can adopt laws to enhance the quality of life, including those based on aesthetic values.
- There will be no taking if the regulation advances a legitimate governmental interest and the landowner retains some viable use of property.
- There will be no taking if the effect of the regulation is to deny **speculative future** profit.

- The court will look at the entire parcel of land, not just the regulated portion.[18]

Recent Cases

Beginning in the 1980s, a series of takings cases made their way to the Supreme Court, and new wrinkles were added to the understanding of what is permissible regulation without compensation. In a 1987 case reminiscent of *Pennsylvania Coal Co. v. Mahon*,[19] the Court found that a Pennsylvania law requiring coal companies to leave at least 50% of the coal beneath homes, public buildings, and cemeteries in order to prevent subsidence did **not** constitute a taking. *Keystone Bituminous Coal Association v. Benedictus*[20] demonstrates that minor changes in the facts and careful drafting of a statute, along with other factors, can lead to a different result. A case in which the Court added a new aspect to takings case law, *First English Evangelical Church v. County of Los Angeles*,[21] ultimately resulted in a finding that the regulation in question did **not** constitute a taking. Before sending the case back to the state court for further consideration, the Court recognized that a "temporary taking" was possible. A governmental agency might have to pay compensation to a property owner for loss of the use of the property while an unconstitutional regulation was in effect.[22]

In 1987, the Court addressed the question of whether government can require, without compensation, dedication of land or other contributions by property owners to offset the cost to the community that results from development. In *Nollan v. California Coastal Commission*,[23] the state attempted to require that owners of an oceanfront lot allow the public to walk across the front part of their lot in exchange for the grant of a building permit to build a vacation home. Even though the Court found in *Nollan* that this requirement by the Coastal Commission violated the takings clause, they based their decision on the lack of connection (or "nexus") between the burden on the public and the benefit of the requirements imposed by the government.

Perhaps the most well-known takings case in recent years was *Lucas v. South Carolina Coastal Commission*,[24] also involving a beachfront housing development. The state statute challenged in *Lucas* had been poorly drafted; it failed to include a variance or hardship provision. Its effect on the plaintiff was found to result in an unconstitutional taking.[25] Under the terms of the statute as originally drafted, David Lucas could not build on two oceanfront lots he had bought that were surrounded by other houses in a development. Although the statute was later amended in such a way that Lucas could have obtained his building permit, he chose to pursue the case to the Supreme Court rather than develop his property.

Further driving home the point that the details in drafting a statute or ordinance can make the difference between validity and a requirement to pay compensation, the Supreme Court in *Dolan v. City of Tigard*[26] found that floodplain restrictions were reasonably related to the impact of new construction, but that a required dedication of private land within the floodplain for a public bicycle path, without compensation, was not constitutional. The Court reasoned that increased impact of the expanded hardware store was not in "rough proportion" to a requirement that the property owner give the City the land for the bicycle path.

Avoiding Takings Disputes

Case law is not the only area in which the personal property rights or "takings" campaign is having an impact. Frustrated by their lack of success in dramatically changing takings law through the courts, development interests have encouraged the introduction of bills that would statutorily expand the law of takings beyond what the U.S. Constitution provides. These "takings" bills have been introduced in Congress and introduced or proposed in all 50 state legislatures. An extensive media campaign has also created an impression of public frustration with resource protection laws.

Preservationists who dedicate their time and talents to the protection of battlefields and other cultural resources should not be distracted by unexpected claims of constitutional takings or alleged violations of property rights. While there is no guarantee that claims will not arise, government agencies and preservation groups should keep the following guidelines in mind:

Know the law. While you should not be expected to study this area of law in depth, it helps to be familiar with the basics and to keep the lines of communication open with your legal counsel.

Strive for good community relations and education. It is well worth the time and effort to involve the larger community and adjacent property owners in decisions, explain why new regulations are necessary, and demonstrate the long-term benefits.

Remember the goal of balance and fairness. While preservationists should be vigilant and thorough in protecting resources, especially in the face of well-financed opposition, it is also important to continually examine whether the preservation goals can be achieved in a way that addresses the concerns of relevant property owners.

Research and respond to anecdotes. A well-worn tactic of those who seek to expand takings law and limit resource protection programs is to

use anecdotal stories of great hardship and burdens on sympathetic-sounding property owners. All too often, these stories are not accurate—or there was a reasonable solution available that was not used. Getting an accurate story is an important part of these public policy debates.

Have property owners be your advocates. The private property rights campaign is often backed by large business interests and trade associations. It is in their interest to have the public face on their arguments be "the little guy." Many property owners work to enact and enforce historic preservation and environmental laws in the interest of protecting quality of life in the community. When community protection laws are challenged, make sure voices for protection are part of the community and explain their personal interests.

Notes

1 For more detailed guidance on the law of takings, see *generally* Sugameli, "Takings Issues in Light of Lucas v. South Carolina Coastal Council: A Decision Full of Sound and Fury Signifying Nothing," 12 *Virginia Environmental Law Journal* 439 (1993).

2 In the last decade, new property rights organizations have formed and some conservative "think tanks" have distributed information about how to use property rights arguments to promote real estate development interests. In our democracy, vigorous and informed debate is healthy and productive, but it is important to recognize that the increase in the number of court cases and legislative proposals has been carefully orchestrated.

3 U.S. Const. amend. V. The takings clause is applied to state and local government actions through the Fourteenth Amendment.

4 Duerksen and Roddewig, *Takings Law in Plain English* at *vii* (1994). This pamphlet is available from the American Resources Information Network, (800) 846-2746.

5 U.S. Const. amend. V. The due process clause is applied to state and local government actions through the Fourteenth Amendment.

6 260 U.S. 365 (1926).

7 *See* Bosselman, Callies & Banta, *The Takings Issue* 124-33 (Council on Environmental Quality 1973).

8 Battlefield preservationists should be interested to note that the famous Supreme Court Justice Oliver Wendell Holmes fought in the Civil War with the 20th Massachusetts. Holmes was wounded on May 1, 1863, at Fredericksburg, Virginia. *See* Bowen, *Yankee from Olympus* at 184 (1943).

9 260 U.S. at 413.

10 Bosselman, supra note 7, 124-40. Chapter 8 of Bosselman is entitled *Pennsylvania Coal v. Mahon: Holmes Rewrites the Constitution.* Justice Brandeis wrote a vigorous dissent to Justice Holmes' *Pennsylvania Coal* opinion. 260 U.S. at 416.

11 The first zoning ordinance in the United States was adopted by New York City in 1918 and applied in Manhattan. The major proponents of adopting were prominent business leaders who had invested heavily in real estate and were concerned that their property values were in jeopardy because stockyards were allowed to be built next to department stores. Thus, "property rights" arguments were used to create zoning laws originally.

12 272 U.S. 365 (1926).

13 In *Euclid*, the property owner's takings claim was based on a significant reduction in value of 75%, from $10,000 per acre when industrial development was allowed to $2,500 per acre as zoned.

14 The courts look for "reasonable economic use" by the property owner. A taking will usually be found only if there is an extreme economic impact on the property owner.

15 The courts will balance the public benefit with the private loss. Both historic preservation and protection of natural resources have long been recognized as valid public purposes.

16 The most difficult cases arise when governments seek to allow public access, a physical incursion, to private property. If a preservation plan includes the need for public access, it would be advisable to pursue purchase of the land outright or an access and conservation easement. At a minimum, situations involving access should be closely analyzed by legal counsel before enactment of any regulation.

17 438 U.S. 104 (1978).

18 As an example, a property owner might try to divide an existing parcel of land into the portion where building (or other use) is prohibited (e.g., a flood plain) and another portion, and then claim that 100% of the value of the regulated portion has been denied. The courts have generally seen through this tactic and consistently rejected it.

19 *See* note 6.

20 480 U.S. 470 (1987).

21 482 U.S. 304 (1987).

22 While the *First English* decision represented adoption of an important **remedies** concept, it is sometimes misinterpreted as expanding the basic takings test. It should be remembered that the challenged regulation did not result in a taking.

23 483 U.S. 825 (1987).

24 505 U.S. 1003 (1992).

25 While the Court found in favor of Lucas, it also defined the "nuisance exception" in its ruling. The Court stated that a law that prohibits a use of property that would constitute a public nuisance will **not** constitute a taking, even if application of the law denies a property owner all economic value.

26 114 S.Ct. 2309 (1994).

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